NO. 41748-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES N. TRUJILLO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda Lee and Edmund Murphy

No. 10-1-01300-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether, in pleading guilty to the amended Information, the defendant agreed to the allegation that he was on community custody at the time of the new offense?

2. Whether the defendant waived any objection to the establishment of his criminal history, calculation of his offender score, and his sentence range where he made no specific objection and agreed to them on the record?

3. If the case is remanded for re-sentencing, the State may present evidence to prove the defendant's offender score?

B. STATEMENT OF THE CASE.

1. Procedure

On March 24, 2010, the Pierce County Prosecuting Attorney (State) charged the defendant, James N. Trujillo, with one count of unlawful possession of a controlled substance with intent to deliver (oxycontin). CP 1-2. On November 3, 2010, the defendant entered a plea of guilty to an amended Information before the Hon. Linda Lee. CP 27, 11/3/2010 RP 11. The amended Information added a school zone sentencing enhancement and an allegation that the defendant was on community custody at the time he committed the new offense. CP 25.

On December 6, 2010, the defendant appeared for sentencing before Hon. Edmund Murphy. 12/6/2010 RP 2 ff. Judge Murphy sentenced the defendant within the standard range to a total of 64 months in prison. CP 45, 12/6/2010 RP 23. On January 5, 2011, the defendant filed a timely notice of appeal. CP 53.

2. Facts

The relevant facts in this case are confined to what occurred at the defendant's plea hearing and sentencing. At sentencing, the focus was on the recommended sentence, not on the offender score. The criminal history and offender score will be discussed in detail below. Defense counsel argued for a Drug Offender Sentencing Alternative (DOSA). RCW 9.94A.660, 662. 12/6/2010 RP 2, 18. Unfortunately the defendant had failed to appear for his DOSA evaluation. *Id.*, at 8. The Community Corrections Officer declined to set another appointment. *Id.*, at 9. The state opposed a DOSA and argued for a sentence at the high end of the standard range. *Id.*, at 13. The court sentenced the defendant after hearing from all parties. *Id.*, at 23.

C. ARGUMENT.

1. THE DEFENDANT'S GUILTY PLEA WAIVED OBJECTION TO A CORRECT CALCULATION OF HIS OFFENDER SCORE AND SENTENCE WHERE HE AGREED TO BOTH.

The State normally bears the burden to prove by a preponderance of evidence the existence and comparability of a defendant's prior conviction. *See* ***State v. Mendoza***, 165 Wn.2d 913, 920, 205 P. 3d 113 (2009); ***State v. Ross***, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). When a defendant affirmatively acknowledges that a conviction is properly included in the offender score, the trial court does not need further proof before imposing a sentence based on that score. ***Ross***, at 233.

In this case, the criminal history understood by the parties is reflected in paragraph 6 of the Statement of Defendant on Plea of Guilty (Plea Statement). CP 28, Appendix A. The State detailed the defendant's criminal history and offender score in a stipulation signed by the prosecutor and defense counsel. CP 37-38. The criminal history is also included on the Judgment and Sentence, which also reflects that the petitioner's offender score is 3. CP 42. As will be argued in detail below, the petitioner adopted the offender score and sentencing range by signing the Plea Statement, specifically agreed to it in the plea colloquy, and at sentencing.

"A guilty plea generally waives challenges to the defendant's offender score because a defendant's agreed standard range sentence is

based in part on his criminal history and because guilty plea agreements usually contain a stipulation to criminal history." ***State v. Harris***, 148 Wn. App. 22, 29, 197 P.3d 1206, 1209 (2008), citing ***In re Personal Restraint of Cadwallader***, 155 Wn.2d 867, 123 P. 3d 456 (2005). "[W]aiver can be found where the alleged error involves an agreement to facts, later disputed...." ***In re Personal Restraint of Goodwin***, 146 Wn.2d 861, 874-75, 50 P.3d 618 (2002).

While ***Mendoza*** does state that the State has the burden to prove a defendant's prior convictions, the case also states that a defendant may "affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence." 165 Wn.2d. at 920. Mendoza was convicted and sentenced as result of a trial, not a plea, as in the present case. In ***Mendoza***, the Supreme Court examined what constituted a "presentence report" under former RCW 9.94A.500 and .530. *Id.*, at 923-924. The Court pointed out that since Mendoza's sentencing, those statutes had been amended in 2008 in direct response to ***Cadwallader***, ***State v. Ford***, 137 Wn.2d 472, 973 P.2d 452 (1999), and ***State v. McCorkle***, 137 Wn.2d 490, 973 P.2d 461 (1999). ***Mendoza***, 165 Wn.2d at 924.

As pointed out in ***Mendoza***, RCW 9.94A.530(2) now includes this language regarding "acknowledgement" as applied in a case like the defendant's (emphasis added):

> *Acknowledgment includes* not objecting to information stated in the presentence reports and *not objecting to criminal history presented at the time of sentencing.* Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

This Court held the "acknowledgement" provision of this statute and RCW 9.94A500(1) unconstitutional in ***State v. Hunley***, 161 Wn. App. 919, 929-930, 253 P. 3d 448 (20011), *review granted*, -Wn. 2d- (#86135-8, September 26, 2011).

Here, the defendant did not specifically object at the time of sentencing. Unlike the cases of ***Mendoza*** and ***Hunley***, in this case the State is not asserting the defendant's "silence" as an admission. On the contrary, defense counsel readily conceded and the defendant himself admitted that he had the prior convictions. The defendant cannot now assert an objection, and even if he preserved it, the State is permitted to present the evidence on remand.

a. <u>In pleading guilty, the defendant agreed that he was on community custody at the time he committed the current offense</u>.

In the present case, paragraph 4(b) of the defendant's Statement on Plea of Guilty includes the allegations charged, including that "the

defendant was under community custody at the time of the commission of the crime adding one point to the offender score." CP 27. This was in the same paragraph that recited the allegation that the defendant was within 1000 feet of a school bus route, which also added time to his presumptive sentence. CP 27-28. It was also in the Amended Information. CP 25.

In the plea colloquy on November 3, 2010, Judge Lee twice specifically reviewed the community custody allegation:

> THE COURT: So there's a community custody --
> [DEFENSE COUNSEL]: And a school bus enhancement that weren't included originally. He was -- my understanding is he was arraigned on that.
>
> 11/3/2010 RP 3.

Judge Lee asked the defendant if he understood that he was pleading guilty to this allegation:

> THE COURT: Sir, you've been charged in the Amended Information in count 1 with the crime of unlawful possession of a controlled substance with intent to deliver, adding the aggravating circumstances of *being on community custody at the time of the offense*, and school bus route stop enhancements. Is that your understanding?
> DEFENDANT: Yes.
> THE COURT: Did you review paragraph 4 (b) which outlines the elements of that charge?
> DEFENDANT: Yes.

11/3/2010 RP 6-7 (emphasis added).

Later in the colloquy, there was this exchange:

> THE COURT: Mr. Trujillo, even though you have that statement that you are not admitting guilt, by pleading

> guilty today, *it will be as if you admitted to all the facts that have been charged against you.*
> THE DEFENDANT: Yes.
> THE COURT: And *you'll be sentenced as if you admitted all the facts that have been charged against you.* Do you understand that sir?
> THE DEFENDANT: Yes.

11/3/2010 RP 10-11 (emphasis added).

The additional community custody point in an offender score is a factual issue determined by the court. *See* ***State v. Jones***, 159 Wn.2d 231, 234, 149 P. 3d 636 (2006). Here, the defendant agreed to it as much as the school zone enhancement when he pleaded guilty to the allegations.

b. The defendant agreed to his offender score.

Paragraph 6 of the Plea Statement acknowledges that the defendant's offender score is 3, and his standard range sentence is 20+ - 60 months; plus a 24 month enhancement, for a total sentencing range of 44+ - 84 months. CP 28. Paragraph 6(b) says:

> The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions and juvenile adjudications or convictions, whether in this state, in federal court, or elsewhere.

CP 28. The defendant further agreed to this offender score and sentencing range in the plea colloquy. 11/3/2010 RP 7.

At sentencing, the prosecuting attorney explained that the defendant had an offender score of 3, based upon prior 2 convictions; unlawful delivery of a controlled substance, and unlawful possession of a

controlled substance, both from a sentencing in July, 2009. 12/6/2010 RP 11. The prosecutor went on to give the cause number of the prior conviction, 08-1-06056-1, and to discuss the details of the case. 12/6/2010 RP 12. Among other facts, the prosecutor pointed out the quantity of drugs involved and that police seized 41 handguns from the defendant's residence. *Id.* The defendant's prior convictions were also from Pierce County Superior Court. CP 37, 42.

In his argument, defense counsel agreed that the defendant has two prior convictions and that the defendant's offender score is 3. 12/6/201 RP 19. Counsel made clear that he had discussed the offender score with the defendant because the defendant thought that his score was 2, based on the prior convictions. *Id.* The difference was the fact that the defendant was on community custody at the time of the new offense. *Id.*

In continuing argument, the prosecutor again compared the facts of the current case with the defendant's two prior offenses. 12/6/2010 RP 21.

In allocution, the defendant disputed the prosecutor's characterization of the defendant's prior case, but acknowledged the convictions. He stated: "I didn't have 41 guns in my last case. I only had two guns." 12/6/2010 RP 22.

In addition to RCW 9.94A.530(2), the present case is analogous to ***State v. Nitsch***, 100 Wn. App. 512, 997 P. 2d 1000 (2000). There, the defendant filed a pre-sentence report in which he affirmatively alleged his standard range to be 111-147 months on an assault charge, and 26-34

months on a burglary charge, which he later argued on appeal were committed in the same course of conduct. *Id.* at 522. The court found that Nitsch could not have arrived at the ranges of 111-147 months and 26-34 months without using the offender score as calculated by the State. *Id.* Nitsch then claimed on appeal for the first time that the offender score calculation of two was erroneous. The court held that he had waived his objection through his explicit agreement to the offender score, in which he must have agreed that his crimes were not the same criminal conduct for score purposes. *Id.*, at 521-522.

Also, in ***In re Personal Restraint of Shale***, 160 Wn.2d 489, 158 P. 3d 588 (2007), the trial court went through a plea colloquy very similar to the one in the present case. *Id.*, at 495. Citing ***Nitsch***, the Supreme Court held that because the defendant had not objected or raised the issue of his offender score at the time of the plea and sentence, he could not challenge it in his collateral attack. *Id.*, at 496.

Here, the defendant did not specifically object to the criminal history or the calculation of the offender score. There is a general notation on the criminal history stipulation that he "refused to sign-objects." CP 38. However, he made no specific objection and, in fact, went on to admit that he had the two prior convictions. It is understandable why the defendant did not specifically object. He was being sentenced in the same court and county as he had been the year before. There was no real question that he had two prior convictions.

The defendant did not and does not claim that his prior convictions do not exist, washed out, were the same criminal conduct, or any other error. The defendant here should not be permitted to complain where he was advised orally and in writing, regarding his criminal history and offender score. He acknowledged his score and sentencing range in the Plea Statement and at the sentencing hearing. Like ***Nitsch***, his offender score of 3 could not be arrived at unless the prior offenses, which he and his attorney agreed to, were counted.

2. IF REMAND FOR RESENTENCING IS NECESSARY, THE STATE MAY ENTER EVIDENCE OF THE DEFENDANT'S CRIMINAL HISTORY.

In ***State v. Bergstrom***, 162 Wn.2d 87, 89, 169 P.3d 816 (2007), the Supreme Court remanded for resentencing where the lower court erroneously relieved the State of its burden to establish the defendant's criminal history. At the sentencing hearing, defendant's counsel acknowledged the criminal history offered by the State when she agreed with its recommendation as to the sentencing range (which presupposed the criminal history) and did not object to the prosecutor's criminal history calculation. *Id.* at 95. Although the defendant pro se contested his offender score and argued that some of his prior convictions encompassed the same criminal conduct, the State reasonably relied on defense counsel's earlier affirmative acknowledgment and consequently did not offer any evidence.

Id. at 96-97. The Court held that the State should be allowed to introduce evidence of the criminal history at resentencing, emphasizing that it is the State's burden to establish the defendant's criminal history. *Id.* at 93, 97-98.

Here, there is no objection at sentencing and the State consequently has not had an opportunity to put on its evidence. It is appropriate to allow additional evidence at sentencing. In this case, there was no specific objection and the sentencing court never had an opportunity to correct any errors or to make a determination. Therefore, if this Court finds that the defendant preserved his objection, the case should be remanded with a full opportunity for the State to prove the defendants' criminal histories at resentencing. ***State v. Mendoza***, 165 Wn.2d at 930; ***State v. Bergstrom***, 162 Wn.2d at 97-98; RCW 9.94A.530(2).

D. CONCLUSION.

The defendant pleaded guilty, admitting all the facts charged, including that he was on community custody when he committed his current offense. He and his attorney both admitted and acknowledged the offender score and criminal history. There was no error in calculation of

the offender score or the sentence. The State respectfully requests that the judgment and sentence be affirmed.

DATED: October 31, 2011

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Date Signature

PIERCE COUNTY PROSECUTOR

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